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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 539

SOCIETE INTERNATIONALE, ETC., (INTERHANDEL), PETITIONER

v.

WALLY KELBERINE AND LENKA BERLIN

No. 549

WALLY KELBERINE AND LENKA BERLIN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL); RAMSEY CLARK, ACTING ATTORNEY GENERAL, AND HENRY FOWLER, SECRETARY OF THE TREASURY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ACTING ATTORNEY GENERAL AND THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 363 F. 2d 989.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1966, and a timely motion for rehearing was denied on June 16, 1966. The petition in No. 539 was filed on September 9, 1966; the petition in No. 549 was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a) is set out in the Appendix, *infra*, pp. 13-16.

QUESTION PRESENTED

In 1963, Societe Internationale and the Attorney General settled the litigation between them relating to the ownership of certain shares of General Aniline & Film Corporation stock vested by the Alien Property Custodian in 1942. So far as the governmental respondents are concerned, the question presented is whether the suit brought by petitioners Kelberine and Berlin to enjoin the Attorney General and the Secretary of the Treasury from making payments to Societe Internationale in accordance with the terms of that settlement was properly dismissed as an unconsented suit against the United States.

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[1] "Pet. App." refers to the appendix to the petition in No. 549. "J.A." refers to the Joint Appendix in the court of appeals.

STATEMENT

1. *The nature of the action.* Petitioners Kelberine and Berlin[2], brought this action in March 1965, on behalf of themselves and all others "similarly situated," to recover the damages they allegedly suffered at the hands of the Nazi regime in Europe between 1933 and 1945, prior to their emigrating to the United States and becoming American citizens. The complaint alleged that petitioners were entitled to recover against the defendant Societe Internationale—a Swiss holding company, commonly known as "Interhandel"— on the ground that Interhandel was the "creature" of I. G. Farbenindustrie, a German corporation, which was part of the "Nazi conspiracy" that was responsible for petitioners' injuries. Petitioners did not allege that either of them was directly injured by Interhandel or I. G. Farben.

Petitioners joined the Attorney General and the Secretary of the Treasury as co-defendants in an attempt to insure their recovery in the event they prevailed in the suit against Interhandel. They sought by this means to reach $120,000,000 then being held in the United States Treasury for Interhandel's account. Petitioners conceded that they did not claim

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[2] Cases No. 539 and 549 both seek review of the same decision of the court of appeals, which affirmed, as to all defendants, the dismissal of the complaint filed by petitioners in No. 549. Although Interhandel has also petitioned for certiorari (No. 539)—raising issues relevant only to the controversy between it and Mesdames Kelberine and Berlin—we shall, for convenience, refer to the latter as "petitioners" and to all other parties by name.

an equitable lien upon the fund in the Treasury but were merely potential judgment creditors against Interhandel (J.A. 100-101). The complaint asked that the governmental defendants be enjoined from paying any of that money to Interhandel pending the resolution of petitioners' lawsuit against the corporation; that the class which petitioners claimed to represent be awarded judgment of the entire $120,000,000; and that petitioners' individual claims be paid "pro rata" out of that sum.

2. *The fund in the Treasury.* The money in the Treasury account represented a portion of the proceeds realized from the public sale of certain shares of General Aniline & Film Corporation stock. The shares in question had been owned by Interhandel and were vested by the Alien Property Custodian in 1942 as enemy property under the Trading with the Enemy Act, 50 U.S.C. App. 1, *ff.* After the war, Interhandel brought suit under Section 9(a) of that Act for return of the vested shares. The extensive litigation which ensued [3] was finally ended in 1963 by a stipulation of settlement (J.A. 79-89) entered into between the Attorney General [4] and Interhandel and filed with the district court. *Societe Internationale* v. *Kennedy* (C.A. No. 4360-48, D.D.C.).

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[3] See, *Societe Internationale* v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F.2d 254 (C.A. D.C.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C.), affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (C.A.D.C.), certiorari denied, 350 U.S. 937.

[4] By Executive Order No. 9788 of October 14, 1946, 11 Fed. Reg. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

Under the terms of the settlement, the vested General Aniline stock was sold to the public in March 1965. Some $329,000,000 was realized from the sale, of which approximately $120,000,000 represented Interhandel's share.[5] The settlement agreement, however, expressly subjected Interhandel's share to indemnity provisions in favor of the government (Secs. VIII and IX, J.A. 84-89). In particular, Interhandel agreed to "indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all claims, actions, or liabilities" which might arise from carrying out the terms of the settlement, from the operations of General Aniline & Film Corporation while under government control, and from the claims of certain other persons and the Netherlands Government relating to the ownership of the shares sold (Sec. IX(2), J.A. 86-87).

To insure Interhandel's performance of its indemnity agreement, the stipulation of settlement further provided that Interhandel was not to receive its portion of the proceeds of sale immediately. Rather, its

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[5] Pursuant to Section 39 of the Trading With the Enemy Act, 50 U.S.C. App. 39, the bulk of the government's share of the settlement proceeds were transferred to the War Claims Fund to be used in satisfying the claims of American citizens who suffered losses in World War II. Petitioners are ineligible for awards from that fund, which may only be made to persons who were American nationals at the time the loss or injury occurred. 50 U.S.C. App. 2017c. It should be noted, however, that petitioners have already received some compensation from German authorities (J.A. 51-52) and that other avenues of relief may be open to them elsewhere (J.A. 22-28).

share would be deposited in an account in its name in the Treasury and invested in U. S. Treasury obligations to "be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" (Sec. VIII(1), VIII(4), J.A. 84-85). If any liability were imposed which Interhandel was required to indemnify, the government had the right to cancel an appropriate amount of those Treasury obligations. Sec. IX(5), J.A. 89. The funds in the Treasury could be released to Interhandel only when and to the extent that "the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by * * * this Stipulation [of Settlement]" (Sec. VIII(4), J.A. 84-85).

3. *The proceedings below.* The district court dismissed petitioners' complaint against the governmental respondents as an uncontested suit against the United States (J.A. 102-103). It also dismissed the suit against Interhandel for want of *in personam* jurisdiction (J.A. 200). The court of appeals affirmed both dismissals. As to Interhandel, however, it held that there was *in personam* jurisdiction in the particular circumstances of this case, but that the complaint was properly dismissed for failure to state a claim upon which relief could be granted.

Petitioners' applications for "a stay pending appeal"—*i.e.*, an injunction against the payment of any money to Interhandel *pendente lite*—were denied by the district court on April 9, 1965, by the District of Columbia Circuit on April 12, 1965, by both the Chief

Justice and Mr. Justice Harlan on April 14, 1965, and by the court of appeals again on May 6, 1965.[6]

ARGUMENT

The decision below, affirming the district court's dismissal of the complaint against the Attorney General and Secretary of the Treasury, is clearly correct. There is no conflict or other occasion for review by this Court.

1. It is well settled that, in the absence of an express waiver of sovereign immunity, no court may entertain a suit against the United States.[7] An action nominally against government officials is, in reality, a suit against the United States "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738, * * * or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank*, 372 U.S. 609, 620. Petitioners' admitted purpose in naming the government officers as defendants in the present case was to reach

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[6] Following those denials, partial payment of Interhandel's share of the proceeds of the sale of the G.A.F. stock was made to that corporation in accordance with the stipulation of settlement. Approximately $31,000,000 is retained on deposit in the Interhandel account in the Treasury pursuant to the terms of the settlement agreement.

[7] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

a large sum of money presently in the United States Treasury and to prevent the two cabinet officers from carrying out the terms of an agreement settling a major lawsuit against the government. Thus, as the court of appeals correctly ruled, "the action is against the United States, which has not consented to it" (Pet. App. 9a).

Petitioners appear to base their right to maintain this suit on the theory that this is an action against government officials who have exceeded their statutory authority. See *Dugan* v. *Rank*, *supra*, 372 U.S. at 621-622. Specifically, they assert that the Attorney General lacked authority to settle the suit brought by Interhandel to regain its vested assets. This contention is patently without merit. The courts have uniformly upheld the Attorney General's right to compromise litigation under Section 9 when he deemed it to be in the best interest of the United States to do so. *Halbach* v. *Markham*, 106 F. Supp. 475 (D. N.J.), affirmed *sub nom. Halbach* v. *Bumsted*, 207 F.2d 503 (C.A. 3), certiorari denied, 347 U.S. 933; *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 666-667 (S.D.N.Y.), modified on other points *sub nom. Standard Oil Co.* v. *Clark*, 163 F.2d 917 (C.A. 2), certiorari denied, 333 U.S. 873; *Castell* v. *United States*, 98 F.2d 88 (C.A. 2), certiorari denied, 305 U.S. 652.

Contrary to petitioners' assertion (Pet. 7), the 1962 amendment to Section 9(a)[8] did not limit the Attorney General's authority to settle Interhandel's

[8] Act of October 22, 1962, 76 Stat. 1113, 50 U.S.C. App. 9(a).

lawsuit. Prior to 1962, Section 9(a) prohibited the sale of vested property in litigation, without the parties' consent, until the suit was ended. The sole purpose of the 1962 amendment was to permit the sale of such property, without consent, where "the interest and welfare of the United States require the sale." As the legislative history makes clear, the amendment was intended to increase, not to circumscribe, the Attorney General's discretion in alien property matters. In fact, that Act was specifically designed to permit the sale of the General Aniline shares involved here. See H. Conf. Rep. No. 2513, 87th Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News 3841, 3842 (1962).

Petitioners rely solely on the provision in the 1962 amendment that the proceeds of sales *pendente lite* authorized by that amendment are to be "held in trust by the Secretary of the Treasury pending the entry of final judgment in any such suit." This provision does not divest the Attorney General of the authority to settle. Before the amendment, Section 9 (a) similarly required vested property to be retained in the Treasury or by the Custodian "until final judgment or decree" in suits under that Section. As we have noted (*supra*, p. 8), this language did not preclude the Attorney General from settling appropriate cases. Nothing in the 1962 amendment or its legislative history supports petitioners' contention that Congress wanted to put parties in Section 9 cases to the additional, expensive and useless formality of prolonging their litigation to final judgment when

all concerned had reached agreement settling their rights.[9]

In addition, as the court below also held, petitioners have no standing to challenge the settlement of Interhandel's suit against the Attorney General. Petitioners were not parties to that litigation and admittedly have no interest in the proceeds of settlement except as potential judgment creditors of Interhandel (Pet. 7). Indeed, had the Attorney General not settled the *Interhandel* litigation, the fund in question would not have been created. Petitioners are thus in the anomalous position of attacking the Attorney General's right to settle the case while attempting, at the same time, to retain the fruits of that settlement for themselves. In essence, their interest is simply that shared

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[9] Petitioners appear to have abandoned the alternate theory urged below that their right to maintain this suit is supported by *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, and *Houston* v. *Ormes*, 252 U.S. 469. The court below properly held that the narrow criteria of those cases were not met here (Pet. App. 9a). Unlike the present case, those cases involved funds in which the government concededly had no interest and which were held by the Secretary of the Treasury solely for the ministerial act of payment to a specified third party, an act compellable by mandamus. In such circumstances, the Court held that a party claiming "an equitable right" in the fund could enjoin disbursement pending his suit against the payee, provided that the court had jurisdiction over the payee so that the decree would bind him and constitute a good acquittance to the United States. The Court was careful to note that its decision was confined to the narrow circumstances outlined above. See 252 U.S. at 473; see, also, *Smith* v. *Harrah*, 51 F. 2d 314 (C.A.D.C.); *McCormack* v. *Harrah*, 51 F. 2d 316 (C.A.D.C.); *Schmitz* v. *Societe Internationale*, 249 F. Supp. 757 (D.D.C.), affirmed on the opinion of the district court, Nov. 14, 1966, Nos. 19,995, 19,996, C.A.D.C.

with all other citizens in seeing that the Attorney General faithfully executes his duties under the law. That is not sufficient to give them standing to sue in federal court. *Massachusetts* v. *Mellon*, 262 U.S. 447; *Pauling* v. *McElroy*, 278 F. 2d 252 (C.A.D.C.), certiorari denied, 364 U.S. 835.

2. There is no substance to petitioners' contention (Pet. 10) that the district court's refusal to grant a further continuance for the taking of depositions constituted a denial of due process. The questions raised by petitioners—the Attorney General's authority to settle Interhandel's suit and the meaning of the 1962 amendment to Section 9(a)—were purely legal issues; they did not require extensive depositions for their proper resolution. The court of appeals correctly ruled that the district court did not abuse its discretion in this matter.

CONCLUSION

The petition for a writ of certiorari in No. 549 to review the judgment in favor of the Attorney General and the Secretary of the Treasury should be denied.[10]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

NOVEMBER 1966.

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[10] In No. 539, Interhandel asks this court to review that portion of the decision below which held it present in the District of Columbia for purposes of *in personam* jurisdiction. Without taking any position as to the correctness of that ruling, which the court of appeals carefully limited to the somewhat unusual circumstances of this case (Pet. App. 7a), we point out that the judgment of the court of appeals was entirely in Interhandel's favor, having affirmed the dismissal of petitioners' suit against it. Thus, in the event the Court does not grant certiorari to petitioners in No. 549, the issues raised in No. 539 are academic as to the parties to the instant suit. In such circumstances, we suggest that the petition in No. 539 does not present an appropriate matter for review by this Court. Cf. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; Stern & Gressman, *Supreme Court Practice*, pp. 21-22 (3d ed., 1962).

APPENDIX

The pertinent portion of Section 9 of the Trading With the Enemy Act, 50 U.S.C. App. 9 provides:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the

President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39, and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this sub-

section and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant

would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

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